

**United States Department of Labor
Employees' Compensation Appeals Board**

E.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sayville, NY, Employer**

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**Docket No. 09-722
Issued: October 14, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2009 appellant filed a timely appeal from a November 12, 2008 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and that she was at fault in its creation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of \$10,954.64 for the period December 8, 2005 to April 14, 2006 because she received compensation for total disability simultaneously with leave from the employing establishment; and (2) whether the Office properly found that she was at fault in the creation of the overpayment.

FACTUAL HISTORY

This case is before the Board for the second time. On July 24, 2008 the Board issued an order remanding the case for the Office to provide appellant with a telephone conference. The

findings of fact and the conclusions of law from the prior order are hereby incorporated by reference. The relevant facts from the case will be set forth.

On December 4, 2000 appellant, then a 42-year-old letter carrier, filed an occupational disease claim alleging that she sustained bursitis of the right arm due to factors of her federal employment. The Office accepted her claim for right calcific tendinitis, right shoulder capsulitis and right medial epicondylitis. On April 10, 2006 it accepted that appellant sustained a recurrence of disability beginning December 8, 2005. The Office paid appellant \$20,464.17 in compensation for the period December 8, 2005 through August 5, 2006. On August 21, 2006 it advised appellant that it was paying her \$20,464.17 for the period December 8, 2005 to August 5, 2006 and, thereafter, paying her on the periodic rolls.

On September 26, 2006 the employing establishment informed the Office that it had paid appellant leave from December 8, 2005 through April 14, 2006. The Office calculated that it paid her \$10,954.64 in net compensation from December 8, 2005 through April 14, 2006.

On September 26, 2006 the Office informed appellant of its preliminary determination that she received an overpayment of \$10,954.64 for the period December 8, 2005 to April 14, 2006 because she received leave from the employing establishment at the same time as she received compensation for total disability from the Office. It notified her of its initial finding that she was at fault in the creation of the overpayment. The Office advised appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupmment hearing.

On October 6, 2006 appellant, through her attorney, requested a telephone conference on the issues of fact of overpayment, fault and waiver. Counsel also requested that the Office allow deductions of \$1,000.00 from each compensation check as repayment. He asserted that the Office had not included an overpayment recovery questionnaire with the preliminary notification of overpayment.

On September 27, 2007 appellant began receiving disability retirement benefits from the Office of Personnel Management (OPM) effective September 27, 2007.

By decision dated November 1, 2007, the Office finalized its finding that appellant received an overpayment of \$10,954.64 for the period December 8, 2005 to April 14, 2006 because she received compensation for total disability and leave from the employing establishment. It found that she was at fault in the creation of the overpayment and, thus, was not entitled to waiver. The Office determined that appellant should forward a check for the entire amount as repayment of the overpayment.

A telephone conference was held on October 2, 2008. Appellant related that she had not received an overpayment recovery questionnaire and the Office informed her that it would send her another questionnaire. She questioned whether an overpayment existed as "she used her leave and she would have received that time back anyway." The Office claims examiner stated, "I explained that [appellant] was unable to receive pay for her sick and annual time as well as compensation for the same period. I inquired as to why [she] cashed the check, although she

never filed a CA-7 form for the period claimed. [Appellant] stated that she waited several months for monies and that she needed the money to live.”

On October 2, 2008 the Office mailed appellant an overpayment recovery questionnaire and provided her 30 days to complete and return the form.

By decision dated November 12, 2008, it finalized its finding that an overpayment of \$10,954.64 from December 8, 2005 through April 14, 2006 occurred because she received compensation for leave used and further finalized its preliminary finding not without fault in creating the overpayment.¹ The Office found that appellant should forward a check for the entire amount to repay the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8129(a) of the Federal Employees’ Compensation Act² provides that, where an overpayment of compensation has been made because of an error or fact or law, adjustment shall be made by decreasing later payments to which an individual is entitled.³ Section 8116 of the Act defines the limitations on the right to receive compensation benefits. This section of the Act provides that, while an employee is receiving compensation, she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.⁴ Section 8118(c) of the Act provides that compensation for disability does not begin until termination of continuation of pay or the use of annual or sick leave ends.⁵ If an employee returns to work and has earnings or is in a paid leave status, she is not entitled to receive wage-loss compensation for temporary total disability for the same time period.⁶

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained right calcific tendinitis, right shoulder capsulitis and right medial epicondylitis due to factors of her federal employment. It further accepted that she sustained a recurrence of disability on December 8, 2005 and paid her compensation beginning that date. On September 26, 2006 the employing establishment informed the Office that appellant received leave from December 8, 2005 through April 14, 2006. The Office determined that it paid her \$10,954.64 in net compensation for the period December 8, 2005 through April 14, 2006.

¹ The Office included language relevant to determining whether appellant was entitled to waiver in finalizing its determination that she was at fault in the creation of the overpayment; however, any error is harmless as it does not affect the disposition of the case.

² 5 U.S.C. §§ 8101-8193.

³ *Id.* at § 8129(a).

⁴ *Id.* at § 8116(a).

⁵ *Id.* at § 8118(c).

⁶ *See* 20 C.F.R. § 10.401.

The Board finds that appellant received an overpayment of \$10,954.64. An employee is not entitled to receive paid leave and compensation for the same period.⁷ Appellant has not challenged that she received compensation for disability and leave from the employing establishment but instead argued that she was entitled to receive both her leave and compensation. The Act, however, specifically prohibits receiving wage-loss compensation from the Office while using annual or sick leave.⁸ As appellant received both wage-loss compensation for total disability and leave from the employing establishment, there exists an overpayment of compensation in the amount of \$10,954.64.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act⁹ provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations¹⁰ provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. The regulation states:

“Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from the Office are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect.”

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in creating an overpayment of compensation because she accepted payments which she knew or should have known to be incorrect. It must,

⁷ See *L.C.*, 59 ECAB ____ (Docket No. 08-209, issued June 16, 2008); *Lee B. Bass*, 40 ECAB 334 (1988); 5 U.S.C. §§ 8116, 8118.

⁸ 5 U.S.C. § 8118.

⁹ *Id.* at § 8129(b).

¹⁰ 20 C.F.R. § 10.433.

thus, establish that at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.¹¹

The Board finds that appellant is not without fault in the creation of the overpayment. The Office informed appellant on August 21, 2006 that it was paying her compensation for disability for the period December 8, 2005 through August 5, 2006. Appellant was aware that she received compensation covering the period during which she used leave. When questioned by the claims examiner in the telephone conference as to why she cashed the check, she stated that she needed the money to meet living expenses. Appellant also asserted that she was entitled to both leave and disability compensation. In applying the tests to determine fault, the Office applies a “reasonable person” test.¹² While appellant contends that she was entitled to both leave and compensation, it was not reasonable for her to expect that she could receive compensation for total disability from the Office and also sick or annual leave from the employing establishment.¹³ The Board, thus finds that, under the circumstances of the case, she is not without fault in the creation of the overpayment.

On appeal, appellant argues that she did not receive an overpayment questionnaire from the Office after the telephone conference. She nonetheless obtained the overpayment recovery questionnaire form from the computer and timely sent it to the Office; however, the Office did not consider the form in reaching its decision. Appellant asserts that she would suffer severe hardship repaying the overpayment. The record indicates that the Office mailed a copy of the overpayment recovery questionnaire to her correct address on October 2, 2008. The Board has held that, in the absence of evidence to the contrary, a letter properly addressed and mailed in the due course of business, such as in the course of the Office’s daily activities, is presumed to have arrived at the mailing address in due course. This is known as the mailbox rule.¹⁴ There is no evidence that the overpayment questionnaire was returned to the Office and the record does not establish that the Office received a completed questionnaire from appellant prior to issuing its November 12, 2008 decision. Regarding appellant’s argument that she would incur hardship repaying the overpayment, the Board notes that she is not without fault in creating the overpayment, she is not entitled to waiver.¹⁵

CONCLUSION

The Board finds that appellant received an overpayment of \$10,954.64 for the period December 8, 2005 to April 14, 2006 because she received compensation for total disability and

¹¹ See *Otha J. Brown*, 56 ECAB 228 (2004); *Robin O. Porter*, 40 ECAB 421 (1989).

¹² *Ralph P. Beachum, Sr.*, 55 ECAB 442 (2004).

¹³ See *L.C.*, *supra* note 9.

¹⁴ *Jeffrey M. Sagrecy*, 55 ECAB 724 (2004).

¹⁵ See *Tammy Craven*, 57 ECAB 689 (2006) (if an individual is at fault, the Office may not consider waiver).

leave from the employing establishment.¹⁶ The Board further finds that the Office properly found that appellant is at fault in the creation of the overpayment.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 12, 2008 is affirmed.

Issued: October 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where the Office seeks recovery from continuing compensation payments under the Act. *See Joan Ross*, 57 ECAB 694 (2006).

¹⁷ Appellant submitted new medical evidence with her appeal. The Board has no jurisdiction to review new evidence on appeal; *see* 20 C.F.R. § 501.2(c).